

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

**IN RE: REALPAGE, INC., RENTAL
SOFTWARE ANTITRUST LITIGATION
(NO. II)**

Case No. 3:23-md-3071

MDL No. 3071

JURY DEMAND

Chief Judge Waverly D. Crenshaw, Jr.

**This Document Relates to:
ALL CASES**

JOINT STATUS REPORT

I. SETTLEMENT DISCUSSIONS

A. MARCH 1, 2024

1. Plaintiffs are mediating with one group of Defendants on March 15, 2024, via Zoom, and with another group of Defendants on April 8, 2024, in Washington, DC. Plaintiffs have also engaged and continue to engage in bilateral settlement discussions with other Defendants.
2. Plaintiffs have reached agreements in principle with Defendants Pinnacle Property Management Services, LLC and Apartment Income REIT, Corp., d/b/a AIR Communities (“AIR”).

II. PLEADINGS, MOTIONS, AND ORDERS

A. MARCH 1, 2024

1. The Court issued a Case Management Order on February 16, 2024 (“CMO”). Dkt. 818.
2. The Court has also entered orders on the parties’ proposed protective order (Dkt. 828), ESI order (Dkt. 815), Rule 502 stipulation (Dkt. 822), deposition protocol (Dkt. 816), and expert discovery order (Dkt. 814).
3. Certain Defendants¹ filed a motion to dismiss for lack of jurisdiction in October 2023 (“Motion”). Dkt. 583. On January 10, 2024, the Court ordered the parties to

¹ ConAm Management Corporation (“ConAm”), CONTI Texas Organization Inc., d/b/a CONTI Capital (“CONTI”), Essex Property Trust, Inc. (“Essex”), Prometheus Real Estate Group, Inc.

meet and confer “on the preservation of Defendants’ jurisdictional arguments in light of the practical implications of transfer in the multidistrict litigation” and further ordered the parties to “jointly file notice on the extent of their agreement” by January 19, 2024. Dkt. 697. The parties have met and conferred several times and exchanged several emails articulating their positions. To narrow the dispute and minimize the burden on the Court, and reserving all rights and arguments concerning personal jurisdiction, Plaintiffs have agreed to dismiss Defendants ConAm, Essex, Sherman, and Windsor from the *Kabisch* litigation, as each of these Defendants is named in another constituent class case in which it does not contest personal jurisdiction. Thus, this dispute is non-dispositive for those Defendants, and they will remain in this MDL. Defendants ConAm, Essex, Sherman, and Windsor agreed that the dismissal will resolve the motion (Dkt. 583) as it relates to them. As of the filing of this report the remaining Defendants – Prometheus, Sares Regis, Rose, and CONTI – continue to maintain their Motion.

4. Plaintiffs and counsel for AIR filed a Notice of Settlement and Joint Motion for Relief to Finalize Settlement on February 5, 2024, asking the Court to stay deadlines as to AIR. Dkt. 715. Plaintiffs request that that motion be granted.

III. DISCOVERY

A. MARCH 1, 2024

1. Plaintiffs sent their first and second sets of requests for the production of documents on Defendants on February 6, 2024, deemed served February 16, 2024, per the CMO.
2. The parties² served initial disclosures on February 26, 2024. Plaintiffs have raised a dispute with all of the Defendants over the sufficiency of their disclosures.

Plaintiffs’ Statement:

Fed. R. Civ. P. 26(a)(1)(A) requires each Defendant to identify by name each individual “likely to have discoverable information... that the [Defendant] may use to support its claims and defenses....” Unfortunately, despite knowing the scope of Plaintiffs’ claims for months (and for some Defendants, since October 2022), Defendants’ February 26, 2024, initial disclosures are

(“Prometheus”), Rose Associates, Inc. (“Rose”), Sares Regis Group Commercial, Inc. (“Sares Regis”), Sherman Associates, Inc. (“Sherman”), and Windsor Property Management Company (“Windsor”).

² Excluded here are Defendants, CONTI, Rose, and Prometheus who have not served initial disclosures as of the date of this filing. Defendant Sares Regis served its initial disclosures on February 27.

woefully deficient. **Despite the scope and magnitude of this case, every single Defendant (no matter the size) identified only one to three total individuals by name**, excluding class representatives.

For example, of the largest Defendants, RealPage, Inc. (“RealPage”) and Greystar Management Services, LLC (“Greystar”) each identified three total employees, and Equity Residential (“Equity”) and BH Management Services, LLC (“BH Management”) listed a total of two employees each. It is unfathomable that, after conducting a reasonable investigation and denying the allegations in the Complaint through their answers, these Defendants are aware of only two to three employees with discoverable information that may be used to support their claims and defenses. Indeed, Plaintiffs’ own disclosures identified numerous individuals that are likely to have discoverable information for each of these Defendants—26 individuals for Defendant RealPage; 16 for Greystar; 9 for Equity; and 7 for BH Management. Overall, Plaintiffs’ disclosures name over 300 individuals across Defendants who may have discoverable information relevant to Plaintiffs’ claims and defenses, as compared to 91 identified by all collective Defendants.

To further illustrate the lack of detail in Defendants’ disclosures, one other large Defendant, Mid-America Apartment Communities, Inc. (“MAA”), listed only two individuals, plus “[a]ny current or former MAA employee, representative, or agent identified by MAA as a document custodian.” Another Defendant only listed one employee by name and an unnamed Rule 30(b)(6) witness, while another generally identifies its “community and regional managers.” Rather than identifying who at RealPage they interacted with who may have information supportive of their claims or defenses, many Defendants simply listed “[p]resently unknown employees of RealPage.” Plaintiffs can furnish a chart of Defendants’ disclosures to the Court *in camera* if it will assist the Court in understanding the scope of Defendants’ deficiencies.

Defendants argue that they are only required to name those individuals they intend to use support their claims and defenses, and that they have done so. First, the duty to disclose “is not limited to information a party is *certain* it will use,” but also information a party “*may* use to support its claims and defenses.” *O’Byrne v. Weyerhaeuser Co.*, 2021 WL 4287334, at *2 (S.D. Ohio Aug. 25, 2021). Second, the Advisory Committee notes define “use” broadly, to include “any use at a pretrial conference, to support a motion, or at trial” as well as “in discovery.” To believe Defendants’ position would mean that, for example, RealPage will defend this entire litigation based on the documents and testimony of two Senior Vice Presidents and one Vice President, or that Greystar and Equity have no present intention of using any documents or testimony from a single person actually involved with leasing decisions. Given how long Defendants have had to investigate this case and develop these disclosures, that simply defies logic.

The purpose of initial disclosures is to accelerate the exchange of basic information “to assist the parties in focusing and prioritizing their organization of discovery.” *Roane Cnty., Tennessee v. Jacobs Eng’g Grp., Inc.*, No. 3:19-CV-206-TAV-HBG, 2020 WL 5262250, at *2 (E.D. Tenn. Sept. 3, 2020) (quoting *Hesco Parts, LLC v. Ford Motor Co.*, No. 3:02-CV-736-S, 2007 WL 2407255, at *2 (W.D. Ky. Aug. 20, 2007)). Plaintiffs require Defendants’ initial disclosures to identify those individuals upon which Defendants will rely to support their claims and defenses. Plaintiffs require those disclosures to meaningfully negotiate (1) custodians for document production, and (2) proposed deposition limits, both of which have upcoming deadlines in the Court-ordered CMO. Because Defendants’ failure to fulfill their obligations under the Federal Rules jeopardize these other deadlines, Plaintiffs promptly sent Defendants a deficiency letter on February 28, 2024, requesting that Defendants supplement their disclosures no later than

March 7, 2024, to meet their obligations under the Federal Rules. Plaintiffs have also offered to meet and confer if Defendants will not agree to supplement.

Defendants argue that Plaintiffs are complaining that the disclosures will unfairly limit the number of depositions Plaintiffs take or the amount of custodial discovery Plaintiffs receive. That argument misses the point—Plaintiffs need accurate information to assess how many depositions to take and how many custodians to request. Indeed, it appears that Defendants’ disclosures are designed not to provide accurate information, but to foreclose reasonable and proportional discovery in this case, which impacts the lives of millions of Americans.

Defendants’ tactics underscore the importance of early production of documents that have already been produced to government regulators (and illustrate why Plaintiffs proposed the Attachment 1 disclosures included in their proposed Case Management Order, Dkt. 776-1). While Defendants will not tell Plaintiffs who has relevant information, those documents will readily provide that detail and allow Plaintiffs to move forward quickly with custodian negotiations.

Defendants’ Statement:

Defendants have complied with Rule 26(a)(1)(A)(i), and Plaintiffs’ arguments to the contrary are baseless.

As an initial matter, the issues are not ripe for presentation to the Court. Defendants’ liaison counsel received a short letter from Plaintiffs roughly 48 hours ago, which purported to raise deficiencies in every Defendant’s initial disclosures. The letter did not analyze each Defendant’s disclosures individually, despite the fact that whether each Defendant met its obligation to disclose individuals it “may use to support . . . its defenses” is an individualized inquiry. Rule 26(a)(1)(A)(i). A few minutes after sending the letter, Plaintiffs sent Defendants an email indicating they would brief the issue in this status report. Defendants explained that the issue is

not ripe because the parties have not had a chance to meet and confer, but Plaintiffs insisted on putting the issue before the Court immediately. Defendants respectfully suggest that Plaintiffs' conduct sets an unhelpful precedent at the outset of this case; the parties should meet and confer and attempt in good faith to resolve disputes before burdening the Court with them.

Plaintiffs' decision to rush to the Court on this issue is all the more problematic given that their position relies on a misunderstanding of Rule 26(a)(1)(A)(i). Plaintiffs' core argument is that Defendants purportedly failed to identify additional witnesses who are likely to have discoverable information. But Rule 26 requires only that a defendant disclose individuals that it “may *use to support its . . . defenses*”—not every witness who potentially has discoverable information. *See* Fed. R. Civ. P. Adv. Comm. Note Rule 26(a)(1) (party not “obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use”); *Harris v. Advance Am. Cash Advance Ctrs., Inc.*, 288 F.R.D. 170, 171 (S.D. Ohio 2012) (party not obligated to “initially disclose the names of all individuals who have discoverable information, but only those individuals who defendant may use to support its defenses”); *Gluck v. Ansett Australia Ltd.*, 204 F.R.D. 217, 222 (D.D.C. 2001) (“[T]he essential inquiry is whether the disclosing party intends to use the witness.”). Here, each Defendant has disclosed, based on what it knows today, the witnesses *it may rely on* to support its claims or defenses. And if, during its investigation into this case, a Defendant identifies an additional witness upon whom the Defendant intends to rely, that Defendant will supplement consistent with Rule 26(e). No more is required. *See, e.g., Harris*, 288 F.R.D. at 171 (“The distinct purpose of the initial disclosure is to alert the opponent to the existence of a witness whose testimony may be helpful to the disclosing party.”).

Plaintiffs' ultimate complaint appears to be that Defendants' disclosures will somehow unfairly limit the number of depositions Plaintiffs take or amount of custodial discovery they

receive. But Plaintiffs have identified more than 300 individuals and Defendants have identified 91 in their disclosures. Those numbers are already too large, and the parties should focus on *narrowing*—not expanding—the scope of discovery and ensuring it is as efficient and inexpensive as possible.

Separately, Defendants raised with Plaintiffs deficiencies in their initial disclosures under Rule 26(a)(1)(A)(i) and (iii). Plaintiffs have agreed to supplement their disclosures. Defendants reserve the right to raise any issues with these supplemental disclosures once they are served.

IV. MISCELLANEOUS ISSUES

A. MARCH 1, 2024

1. In its February 16, 2024 CMO, the Court requested that the parties inform the Court of their availability for upcoming status conference dates. Dkt. 818 at 8. On February 26, 2024, the parties jointly filed a status report concerning the dates of upcoming Status Conferences. Dkt. 835.

V. ANTICIPATED ISSUES FOR THE STATUS CONFERENCE

A. MARCH 1, 2024

1. Plaintiffs have a discovery dispute concerning the sufficiency of Defendants' initial disclosures. Given that there is only one item on the agenda, the parties are amenable to proceeding via telephonic conference if the Court prefers.

Dated: March 1, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2024, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/Dkt. system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

/s/ Tricia R. Herzfeld

Tricia R. Herzfeld